expressly provided in that clause for the consequence of "such prevention, impediment or delay". The clause expressly provided that such default on the part of the Government should not vitiate the contract. If that clause had been considered by the arbitrator in relation to the question of fundamental breach it would, in our judgment, have been impossible for him, had he understood the "principle of the *Suisse Atlantique* case", to arrive at the conclusion that the continued performance by the Contractor under the contract was rendered impossible or would result in something totally different from that which the contract contemplated, or that the impediments on the site as at June 5, 1973 and the consequent inability to complete the contract works within the extended completion date had created a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made, or which had a frustrating effect and made the contract impossible of performance.

In our judgment the failure of the arbitrator to construe the contract, in particular Clause 32(b) of the Conditions of Contract, and to consider all the facts and circumstances of the case, in particular the fact that the original completion date had been extended and it was within the contemplation of the parties that the time for completion was not of the essence of the contract amount to an error of law apparent on the face of the Award. It is therefore unnecessary for us to consider whether, if in fact the Government was in fundamental breach, the Government could rely on the excepting and protecting provisions in the contract.

Accordingly, the appeal must be allowed with costs here and in the court below and the Award set aside. As counsel for the Attorney-General has intimated that the Government does not intend to proceed with the counterclaim we do not consider this a proper case for the matter to be remitted back to the arbitrator.

Appeal allowed; Award set aside.

Solicitors: *Murphy & Dunbar.*

PATRIOT PTE. LTD. v. LAM HONG COMMERCIAL CO.

[C.A. (Wee Chong Jin C.J., Kulasekaram & D'Cotta JJ.) August 16, 1979]

[Singapore — Civil Appeal No. 64 of 1978]

Contract — Illegal contract — Claim for breach of — False declaration to evade Indonesian customs duties — No assistance by court.

The appellants in this case claimed against the respondents for the purchase price of 4,000 sets of rubber tyres purchased by an Indonesian from a Taiwan seller. The said goods were shipped on a ship proceeding from Taiwan via Singapore to Jakarta, Indonesia. The facts revealed that the appellants opened a Letter of Credit in favour of the Taiwan seller for the agreed purchase price, US$228,305 through their bankers in Singapore. The bills of lading and other supporting invoices and documents covering shipment of the goods were sent to the appellants' Singapore bank by the Taiwan seller. The Indonesian buyer opened a Letter of Credit through a Singapore bank in favour of the appellants, for US$47,000 a much lesser sum than the agreed purchase price. This sum was declared on the "Proforma Invoice" which was supplied by the Indonesian Embassy in Singapore.

The respondents obtained a blank "Proforma Invoice" from the Indonesian Embassy. The appellants signed this blank document and the respondents subsequently filled in all the requisite particulars, most of which were false to avoid payment of customs duties on the imported goods. The arrangement between the respondents and the appellants were contained in three letters from the respondents to the appellants.

When the ship arrived at Jakarta, they were refused entry as they did not tally with the description in the "Proforma Invoice" as endorsed by the Indonesian Embassy in Singapore. The goods were sent back to Singapore and eventually were sent to another Indonesian port. The respondents failed to pay the appellants.

The court below held that the "whole operation was designed expressly by the parties herein and the Indonesian buyer to evade Indonesian Customs duties" and dismissed the appellants' claim on the ground that the contract between the parties was illegal and void. On appeal to the Court of Appeal,

Held, dismissing the appeal: if a party to a contract actively engages in an illegal adventure to get goods into a country in breach of the revenue laws of that country, the court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract.

Cases referred to:-

(1) *Fielding & Platt Ltd.* v. *Najjar* [1969] 1 W.L.R. 357.
(2) *Foster* v. *Driscoll* [1929] 2 K.B. 470.

HIGH COURT.

James Wan Hui Hong for the plaintiffs.

Phua Cheng Kan for the defendants.

Cur. Adv. Vult.

Rajah J.: On all the evidence before me it seems fairly clear that as from sometime in May or June 1974 the plaintiff company and the defendant company in conjunction with some Indonesian buyers in Indonesia were engaged in a conspiracy to defraud the Indonesian Government of its lawful customs dues.

Rubber tyres would be shipped by a seller in Taiwan to a buyer in Jakarta via Singapore. This would be notified to the plaintiff company in Singapore. A bill of lading (with the indorsement "B/L to be switch (*sic*) in Singapore") would be drawn up to this effect together with a supporting Invoice, Packing List and Certificate of Origin. To bring about this shipment of tyres the plaintiff company would open a letter of credit for the full purchase price (in the instant case for US$228,305) through its bankers in Singapore. The documents covering the shipment would then be sent to the Singapore bank by the Taiwan seller. In the meantime the Jakarta buyer would have sent to the Singapore bank a Letter of Credit (in the instant case dated January 17, 1975 — Exhibit 5AB12) in favour of the plaintiff company for a very much lesser sum (in the instant case for US$67,000 later reduced on March 18, 1975 by US$20,000 — Exhibit 5AB14). On receipt of the shipping documents by the Singapore bank it would turn over the documents to the plaintiff company the latter on having executed a trust receipt in favour of the former. A Proforma Invoice, on a form supplied by the Indonesian Consulate, would then be prepared by the defendant company setting out the quantity of tyres and the unit price and the total value of the goods which would be very much

less than the purchase price paid to the Taiwan seller, the plaintiff company having previously signed the Proforma Invoice in blank. The chop of the Consulate would then be obtained to the completed form by the defendant company and the document would then be handed to the plaintiff company who would then prepare the rest of the other documents, that is to say the Invoice and the Packing List. On these documents the goods would then seek entry into Indonesia. The arrangement between the parties to the action was that the balance of the purchase price (that is the difference between the two Letters of Credit) would be paid within two months from the date of the trust receipt referred to above, the defendant company undertaking to make good such payment in the event of the Indonesian buyers failing to make such payment. As consideration for the plaintiff company to open the letter of credit in favour of the Taiwan seller it was to receive a 6% commission on the full purchase price together with a payment of Rupiahs 200 for each set of tyres so imported into Indonesia.

In pursuance of this arrangement the plaintiff company and the defendant company had carried out about seven successful transactions, that is to say the tyres had entered Indonesia on a false declaration to description, unit price and value, thus depriving the Indonesian Government of its legitimate customs dues.

The eighth and final transaction ended in a failure as the Indonesian customs refused entry of the tyres into Indonesia because the actual goods sought to be imported into Indonesia did not tally with the official Proforma Invoice (Exhibit 5AB8). The parties then sought to settle matters amongst themselves. They were unable to do so and now seek the assistance of the courts.

It is quite clear from the evidence before me that this whole operation was designed expressly by the parties herein and the Indonesian buyer to evade Indonesian customs duties and that in this operation a number of persons other than the parties to this action had to be involved and were in fact so involved. It is not for me here to say who they were. A contract which contemplates the performance in a foreign and friendly country — and Indonesia is one such country — of some act which is inimical to the public welfare of that country is a breach of international comity and is regarded as illegal by our courts. It is unlawful to make an agreement in Singapore to do something in a foreign country which will violate the local law, which is what this case is all about.

I hold the agreement entered into between the parties herein illegal and void. The claim is accordingly dismissed. There will be no order as to costs.

The plaintiffs appealed from the above judgment.

COURT OF APPEAL.

L.A.J. Smith (*James Wan Hui Hong* with him) for the appellants.

Phua Cheng Kan for the respondents.

Wee Chong Jin C.J. (delivering the judgment of the Court): This is an appeal by Patriot Pte. Ltd. against the decision of Rajah J. dismissing their claim against Lam Hong Commercial Co. for $464,152.02 and interest. The claim arose out of the purchase of 4000 sets of rubber tyres and tubes by an Indonesian purchaser from a Taiwan seller which were shipped on a ship proceeding from Taiwan via Singapore to Jakarta, Indonesia.

The facts relating to this transaction were these. Patriot Pte. Ltd., the appellants, opened a Letter of Credit in favour of the Taiwan seller for the agreed purchase price of the goods which amounted to US$228,305 through their bankers in Singapore. Two bills of lading containing the endorsements "B/L to be switch in Singapore" and "Notify Patriot (Pte.) Ltd. 94-A Robinson Road, Singapore" together with supporting invoices, Packing Lists and Certificate of Origin covering the shipment of the goods were sent to the appellants' Singapore bank by the Taiwan seller. The Jakarta buyer opened a Letter of Credit through a Singapore bank in favour of the appellants, not for the agreed purchase price, but for a much lesser sum of US$47,000. This sum represented what the parties called "Check Price" of the goods to be imported into Indonesia. This "Check Price" was the price declared by the appellants as shippers on a "Proforma Invoice" which contained, *inter alia*, particulars of the ship, the shipper, the consignee, the description, the quantity, the unit price and the value of the goods shipped. "Proforma Invoices" are supplied by the Indonesian Embassy in Singapore in blank and goods imported into Indonesia from Singapore would have to be accompanied by a completed "Proforma Invoice" containing an endorsement by the Indonesian Embassy.

In the instant case, the respondents obtained a blank "Proforma Invoice" from the Indonesian Embassy. The appellants signed this blank document and the respondents subsequently filled in all the requisite particulars. Most of the particulars were false, the purpose being to avoid payment of the proper customs duties on the imported goods. The arrangement between the respondents and the appellants was contained in three letters from the respondents to the appellants. The first letter dated December 13, 1974, reads as follows: —

"With reference to our discussion and request for your opening L/C for the captioned goods, and in consideration of your such performance and commitment we hereby declare that this is our confirmation of acceptance on the following terms and conditions:—

(1) That the captioned goods be on 'Consignment A/c' for account of our company and that our company shall undertake to settle with your company all accounts in connection with the said goods consigned to our Buyers as stated above;

(2) That L/C for first shipment of 3,000 sets for US$221,490.00 to be opened by you as soon as possible against our Buyer's L/C for the 'Check Price' amount;

(3) That after you have drawn against our Buyer's L/C, the balance amount shall be settled by us within two months counting from the date of the Trust Receipt for the Import Bill concerned;

(4) That all charges, such as transport, handling charges, bank charges including interest, etc., and claims, if any, shall be on our Company's account, and

(5) That your commission at six percent net on the Invoice value be paid to you by our company.

Thanking you for your kind attention and co-operation."

The other two letters, dated January 24, 1975 and

February 3, 1975, contained terms and conditions similar to those contained in the letter of December 13, 1974.

When the ship arrived at Jakarta the Indonesian authorities refused entry of the goods into Indonesia because they did not tally with the description in the "Proforma Invoice" as endorsed by the Indonesian Embassy. The goods were sent back to Singapore and eventually were sent to another Indonesian port. The respondents failed to pay the appellants in accordance with the arrangement contained in the three letters above referred to.

Rajah J. found that the "whole operation was designed expressly by the parties herein and the Indonesian buyer to evade Indonesian customs duties" and dismissed the appellants' claim on the ground that the contract between the parties was illegal and void.

It is contended on behalf of the appellants that there was no evidence or insufficient evidence that the contract was illegal or designed to evade Indonesian customs duties or that they knew it was illegal or would result in evasion of Indonesian customs duties. We do not accept this contention. It is plain from the contract documents and from the undisputed evidence before the trial judge that the declared invoice value of the goods in the "Proforma Invoice" presented to and approved and endorsed by the Indonesian authorities was very much less than the agreed purchase price to be paid by the Indonesian importer to the Taiwan seller. Apart from the evidence at the trial to the effect that the appellants knew that the purpose of undervaluing the goods was to evade payment of the proper Indonesian customs duties and lent themselves to the fulfilment of this purpose by providing the finance to enable the purchase and importation of the goods into Indonesia and by signing the "Proforma Invoice" and the other essential documents in connection with shipment of the goods to Jakarta, the clear inference from the documentary evidence before the trial court supports the trial judge's finding that the appellants were actively involved in an operation to evade Indonesian customs duties.

The case of *Fielding & Platt Ltd* v. *Najjar*[1] relied on by the appellants is distinguishable. In that case the contract was between Fielding & Platt, an English company and a Lebanese company for the English company to sell to the Lebanese company an aluminium extrusion press for £235,000. Payment was to be made by six promissory notes given by the managing director, Mr. Najjar, personally of the Lebanese company. Najjar never paid the first promissory note or any of the others. The English company suspended work on the contract and sued Najjar in respect of the first two notes. Najjar raised a defence of illegality, saying that it was his intention to breach the laws of Lebanon and that the English company were parties to it. In order to import the extrusion press he had to get an import licence from the Lebanese authorities. He had a licence to import a £2,000,000 rolling mill but not a licence to import an extrusion press. He said the English company agreed to help him to import an extrusion press without his having a licence to do so by agreeing to put up a false invoice.

It was held that the contract which was concluded on July 13, 1965 contained no obligation on the English company to invoice the goods as part of a rolling mill. It was also held, even if it were a term, that there was no evidence to suggest that the English company were implicated in this illegality.

It has been settled law since *Foster* v. *Driscoll*[2] that if a party to a contract actively engages in an illegal adventure to get goods into a country in breach of the revenue laws of that country, the court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract.

In our judgment the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Wan & Choo; C.K. Phua.*

THE "EASTERN LOTUS" *ex* "SPRING FLOWER"; URZAD MORSKI W. SZCZECINIE v. MOSCOW NARODNY BANK LTD.

[C.A. (Wee Chong Jin C.J., Chua & Rajah JJ.) January 17, 1980]

[Singapore — Civil Appeal No. 55 of 1979]

Shipping Law — Admiralty proceedings — Arrest of vessel — Several claims against insolvent owners of vessel — Law governing order of priorities — Appellants ranked above respondents in claim but intervened later — Order of priorities not immutable — Court allowing respondents' claim — Appeal.

In this case the vessel "Eastern Lotus" was at the material time flying the Singapore flag and entirely manned by foreign crew. On January 19, 1978, the said vessel was arrested by the Sheriff for non-payment of agents' remuneration. On February 23, 1978 the plaintiffs obtained a commission for appraisement and sale of the vessel.

On March 3, 1978, the respondents as mortgagees of the vessel intervened. On March 17, 1978 they obtained an Order of Court for the payment via the Sheriff of (a) the wages and disbursements of the master and crew (b) the repatriation expenses of the master and crew, and (c) the premia for port risk insurance. It was also ordered (1) that the respondents be subrogated to the rights of the master and crew against the vessel in respect of all monies paid by the respondents pursuant to the order and that all monies so paid shall rank as sheriff's expenses against the proceeds of sale and that the respondents be entitled to payment thereof accordingly and (2) that the costs of the respondents in the motion shall rank after the Sheriff's expenses and the plaintiffs' costs up to and including appraisement and sale be in priority to all other claims.

On June 30, 1978 the appellants filed a caveat against the release and payment out of the proceeds of sale. They intervened in the action on January 15, 1979, having commenced an admiralty action in 1978 against the owners of the vessel in respect of the damage done by the vessel to a bunker pier of theirs at Swinoujzcie, Poland.

The respondents on March 12, 1979 filed a notice of motion for payment out of the sum of $218,817.50 expended by them pursuant to the Order of Court of March 17, 1978. Sinnathuray J. allowed the respondents' claim. The appellants appealed.

Held, dismissing the appeal: (1) in spite of the general order of priorities, a court, in the exercise of its admiralty jurisdiction, is entitled to have regard to the equities in any particular case before it;